BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEVEN M. CONROW	)	
Claimant	)	
	)	
VS.	)	
	)	
GLOBE ENGINEERING CO., INC.	)	
Respondent	)	Docket No. 1,026,353
	)	
AND	)	
	)	
FEDERATED MUTUAL INS. CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant and respondent and its insurance carrier (respondent) requested review of the June 21, 2007, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on September 21, 2007. John L. Carmichael, of Wichita, Kansas, appeared for claimant. Vincent Burnett, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) adopted the opinions of Dr. J. Mark Melhorn and Dr. George Fluter and found that claimant's bilateral carpal tunnel syndrome (at the wrists) and bilateral ulnar nerve entrapment (at the elbows) were caused or aggravated by his work activities. As only Dr. Fluter separated the impairments for both wrists and elbows, the ALJ adopted his opinion and found that claimant had a 10 percent impairment to his left forearm for the carpal tunnel syndrome, a 10 percent impairment for his left arm for his ulnar nerve entrapment, a 10 percent impairment to his right forearm for the carpal tunnel syndrome, and a 10 percent impairment to his right arm for the ulnar nerve entrapment. The ALJ denied claimant's request for a permanent partial disability based on a work disability and found that claimant is only entitled to four separate scheduled injuries, citing *Casco*.[1]

[1] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent requests review of the ALJ's findings concerning the nature and extent of claimant's impairment. Respondent agrees with the ALJ that pursuant to *Casco*, claimant is limited to an award for scheduled injuries rather than a general body impairment. Respondent contends, however, that the ALJ erred in awarding benefits for injuries at multiple levels of claimant's upper extremities. Respondent argues that the Board should adopt the opinions of Dr. Melhorn and Dr. Chris Fevurly when determining claimant's functional impairment and find that claimant had a 10 percent impairment to each upper extremity at the level of the arm. In the alternative, respondent requests the Board to average all the physicians' opinions and assign claimant a 13 percent impairment to each upper extremity.

Claimant argues that he is entitled to compensation based on a whole body impairment of function. Claimant contends that his repetitive work activity aggravated his preexisting arthrogryposis condition and that since arthrogryposis is a congenital whole body condition affecting all joints of the body, the Board should conclude that he suffered an aggravation of a whole body condition. Claimant also argues that given the circumstances surrounding his termination of employment from respondent and his loss of preinjury earnings, he is entitled to an award of compensation of 87 percent based on a work disability. He further argues that nothing in *Casco* changes the fact that he suffered an aggravation of a whole body condition and also maintains that *Casco* was wrongly decided.

The issues for the Board's review are:

(1) Is claimant entitled to an impairment rating based on the body as a whole, or is he limited to impairment ratings based on scheduled injuries?

(2) If claimant is limited to compensation for impairment based on scheduled injuries, is he entitled to two scheduled injuries at the level of the arm or is he entitled to scheduled injuries at the level of the forearm and the arm on both his right and left upper extremities?

(3) If claimant is entitled to an impairment rating based on the body as a whole, is he limited to his functional disability or is he entitled to a work disability? What is claimant's functional disability and/or work disability?

FINDINGS OF FACT

Claimant first started working for respondent in 1979 and worked for one year. He left that employment in 1980 but returned in April 1981 and continued to work for respondent until he was fired on November 11, 2005. He started at respondent working as a deburr hand saw operator. By the time he was fired, he was the assembly supervisor. As part of his job, he ran a lot of vibratory tools and worked on a computer. He worked with saws and performed deburr work, as well as inspecting, running production, and cleaning the shop area.

Claimant suffers from arthrogryposis, a congenital condition that causes ankylosis of the bone. This condition affects his joints, and some of his joints, including his elbows and some of his fingers, are fused. His elbows are fused at not quite 90 degrees. His arms are stuck in that position, but he has motion in his shoulders. He is not able to make a fist, but at the time he was hired by respondent he could grab and pick things up. He had no restrictions to physical activity, and he performed the same type of work that his fellow workers on the line performed. When he started working for respondent, his condition was not painful and did not cause him numbness, tingling, or loss of sensation. It did not affect his ability to move his arms, wrists and fingers, although his elbows could not move.

Eventually, however, claimant's work began to affect him. His arms and hands started to hurt. Because his elbows do not move, his movements come from his shoulders, and he suffered aching in his shoulders. His fingers started tingling and going numb. These problems would go away on weekends , but when he came back to work on Mondays, his problems would return and get worse as the week went on. By the time he was fired in November 2005, his hands were asleep, numb and hurting. His shoulders ached, and he could not sleep at night. He did not report these symptoms to his employer.

Extensive testimony was taken concerning the facts surrounding respondent's firing of claimant. But due to the ultimate determination herein, that evidence need not be repeated here.

After his termination by respondent, claimant filed a workers compensation claim for injuries caused by repetitive use of his hands. He claimed a date of accident of November 1, 2004, and each and every day worked thereafter.[2] He was treated by Dr. Melhorn for the problems with his hands and elbows.

Dr. Melhorn is a practicing physician who is board certified in orthopedic surgery with a subspecialty of medicine of the upper extremities. He evaluated claimant initially on March 3, 2006. Claimant underwent nerve conduction studies, which revealed right and left carpal tunnel and right and left ulnar nerve elbow. Dr. Melhorn performed surgery on

[2] Form K-WC E-1, Application for Hearing filed November 18, 2005.

the right wrist and elbow on April 10, 2006, and on April 24, 2006, he performed surgery on claimant's left wrist and elbow. Immediately after claimant's surgeries, he reported an improvement in the symptoms.

After surgery, claimant had some improvement but continued to have some symptoms. Dr. Melhorn believed the continuing symptoms were a combination of the arthrogryposis and the nerve entrapment. Using the AMA *Guides*,[3] Dr. Melhorn rated claimant as having a 9.45 percent permanent partial impairment to each arm. Combined, these converted to an impairment to the body as a whole of 11.34 percent.

Based on claimant's conditions of arthrogryposis and nerve entrapment, Dr. Melhorn gave claimant permanent work guides that included regular work but limiting use of power and vibratory tools to two hours or less per day and limiting hand over shoulder work. The hand-over-shoulder limitation was related to his arthrogryposis. The limitation on the use of power and vibratory tools was related to his nerve entrapment. Dr. Melhorn reviewed a task list prepared by Dan Zumalt and reviewed by respondent and opined that of the 17 unduplicated tasks on that list, claimant was unable to perform 4 for a 24 percent task loss.

Dr. Melhorn believed that the work activities which claimant performed contributed to the development of carpal tunnel syndrome and ulnar nerve entrapment syndrome. In regard to claimant's elbows, Dr. Melhorn said that the bony pattern of the elbows was not good. That caused increased tension on the nerve at the elbow. Claimant's work activities probably aggravated his already tightly stretched nerve at the elbow.

Dr. Chris Fevurly, a board certified independent medical examiner who is also board certified in preventative medicine, with a certification in occupational medicine, and in internal medicine, evaluated claimant on two separate occasions at the request of respondent. On February 3, 2006, he was asked to examine claimant and offer opinions as to his condition and the relation of his work to those conditions. Dr. Fevurly opined that claimant's job activities, including use of vibrating tools, a rivet gun, and hammering, were contributing factors to the development of carpal tunnel syndrome at the wrists. Claimant's elbows were fused from arthrogryposis, and Dr. Fevurly found nothing new in regard to his elbows.

Dr. Fevurly again evaluated claimant on December 1, 2006, after claimant's surgeries. Claimant told him that he had tried working at a job similar to that he had performed at respondent but was unable to do the gripping required in that job. Dr. Fevurly continued to believe that claimant's bilateral carpal tunnel syndrome was the result of his work conditions but that the ulnar nerve condition was not because claimant had no motion at the elbows and the concept of repetitious motion of the elbows would not apply. He

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

believed that claimant could not have had ulnar nerve injury based on repetitious movement and that claimant's ulnar nerve condition was caused by his congenital condition. Dr. Fevurly found no significant difference in his examinations before and after claimant's surgeries. There was no difference in the functional abilities with his hands. Claimant complained of less sensation in his hands, but there was no way to demonstrate a difference between his pre and postoperative examination.

Based on the AMA *Guides*, Dr. Fevurly rated claimant as having a 10 percent permanent partial impairment in each upper extremity, resulting in a 6 percent whole person impairment for each extremity, which converted to a 12 percent whole person impairment. Dr. Fevurly's impairment rating was based strictly on the carpal tunnel syndrome to claimant's wrists.

Dr. Fevurly stated that claimant should be limited to no use of his upper extremities. Claimant had been inventive in his abilities to overcome his limitations, but Dr. Fevurly did not think that he would be qualified to do any job that requires gripping or hand activity in any fashion. This restriction is 99 percent related to his congenital condition. Dr. Fevurly reviewed the task list prepared by Dan Zumalt and opined that of the 17 unduplicated items on that list, claimant is unable to perform 4 due to his bilateral carpal tunnel syndrome, for a task loss of 24 percent.

Dr. George Fluter is certified as an independent medical examiner, certified in physical medicine and rehabilitation, and certified in internal medicine. He examined claimant on July 27, 2006, at the request of his attorney. Claimant reported to Dr. Fluter that he had pain affecting his shoulders, arms and hands bilaterally. He said that he has had more difficulty following his surgeries. Dr. Fluter diagnosed him as post bilateral carpal tunnel release and ulnar nerve elbow decompression surgeries. Dr. Fluter stated there was a causal/contributory relationship between claimant's current condition and his work-related activities.

Dr. Fluter rated claimant as having a 10 percent permanent partial impairment to both the right and left upper extremities for median nerve entrapment at the wrists. He also rated claimant as having a 10 percent permanent partial impairment to both the right and left upper extremities for ulnar nerve entrapment at the elbows. These combined and converted to a permanent partial impairment to the body as a whole of 22 percent. He did not factor in claimant's preexisting condition. The impairment was based on the peripheral nerve entrapment conditions, not his arthrogryposis condition. Dr. Fluter rated both claimant's nerves separately in each arm. He stated there is nothing in the AMA *Guides* that say you can rate both nerves separately and nothing that says you cannot do that. He stated:

> [Y]ou've got two separate nerves and two separate sites of entrapment, so I don't see why you wouldn't rate them as two separate nerves. . . . The way I read that

> Table 16 is that if you have peripheral nerve entrapment at different levels, then each nerve should be rated at the particular level of entrapment separately.[4]

Dr. Fluter gave claimant restrictions of lifting, carrying, pushing and pulling to 20 pounds occasionally and 10 pounds frequently, providing appropriate thermal protection for the hands when working in cold environments, and avoid activities resulting in direct pressure over the elbows bilaterally. In addition, claimant should limit grasping using each hand, flexion and extension of each wrist, and use of power/vibratory tools with each hand to one-third of an eight hour day. The restrictions on claimant's physical activities are for his carpal tunnel syndrome and ulnar nerve entrapment syndrome. Dr. Fluter reviewed a task list prepared by Jerry Hardin. Of the 28 unduplicated tasks on that list, Dr. Fluter opined that claimant was unable to perform 21 for a 75 percent task loss.

Jerry Hardin, a personnel consultant, met with claimant on August 22, 2006, at the request of claimant's attorney. Claimant and Mr. Hardin prepared a task performance capacity assessment for each job claimant held for the 15-year period before his injury. At the time of the interview, claimant was working for G&D Metals. He started working there June 6, 2006. At that time, he worked as a burr hand part time, working 20 hours a week earning $10 per hour. Claimant told Mr. Hardin that he could not perform that job well but had to earn money for his family. After being told that claimant was no longer working, Mr. Hardin opined that claimant would be able to earn approximately $320 a week in the few positions open to him in the open labor market. He said that claimant's biggest problem will be in not being able to fill out applications because of his hand problems. However, Mr. Hardin did not think claimant was 100 percent unemployable. He believed that claimant could find a position as in retail sales and would be best suited in customer service someplace like Lowe's or Wal-Mart.

Dan Zumalt, a vocational rehabilitation consultant, met with claimant on December 19, 2006, at the request of respondent. Mr. Zumalt performed two evaluations in this case, one based on claimant's description of his job duties and another based on information received directly from respondent.

Mr. Zumalt opined that claimant had transferable skills and would be a fit for first-line supervisor/manager of production. His opinion is that claimant could earn $22.66 per hour and has a 60 percent wage loss. Mr. Zumalt did not conduct a direct Labor Market Survey. He does not know if there is a job open and available for claimant that would pay him $964.80 per week. Claimant told Mr. Zumalt that he was attempting to place three applications a week.

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[4] Fluter Depo. at 33.

PRINCIPLES OF LAW

K.S.A. 44-510d states in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(12) For the loss of a forearm, 200 weeks.

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

. . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

(b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

K.S.A. 44-510e(a) states in part:

If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of

disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-510f(a) states in part:

Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

(1) For permanent total disability, including temporary total, temporary partial, permanent partial and temporary partial disability payments paid or due, $125,000 for an injury or any aggravation thereof;

. . .

(3) subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, $100,000 for an injury or any aggravation thereof; and

(4) for permanent partial disability, where functional impairment only is awarded, $50,000 for an injury or aggravation thereof.

K.S.A. 2006 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

In *Casco*,[5] the Kansas Supreme Court stated:

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
>
> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.
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> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with K.S.A. 44-510d.
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> K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.

In *Bryant*,[6] the Kansas Supreme Court held:

> It is the situs of the resulting disability, not the situs of the trauma, which determines the workers' compensation benefits available in this state. (Following *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 [1984]).

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[5] *Casco*, 283 Kan. 508, Syl. ¶¶ 7, 8, 9, 10.

[6] *Bryant v. Excel Corp.*, 239 Kan. 688, Syl., 722 P.2d 579 (1986).

ANALYSIS AND CONCLUSION

The Board finds claimant suffered repetitive traumas and entrapment neuropathy to both his bilateral median nerves at the wrists and his bilateral ulnar nerves at the elbows. However, the Board does not find that claimant's aggravation of his arthrogryposis requires a finding of a general body impairment and disability. Instead, the situs of his injuries, impairments and disability is limited to his upper extremities.

In *Casco*, the Kansas Supreme Court considered whether an individual who sustained bilateral, parallel injuries to his shoulders was entitled to compensation based upon two separate scheduled injuries, under K.S.A. 44-510d, or as a unscheduled whole body injury, under K.S.A. 44-510e(a). The injuries were not simultaneous, but one was the result of over compensation for the other and so was considered to be to be a natural consequence and, thus, a single injury. Nevertheless, after examining the applicable statutes and the relevant case law, the *Casco* court departed from the well-recognized and long-established case law going back over 75 years.

Previously, bilateral injuries were considered as being outside the statutory schedule of impairments set forth in K.S.A. 44-510d and were treated as a permanent partial general impairment.[7] Now post-*Casco*, the analysis changes somewhat. Apparently, in any combination, scheduled injuries are now the rule, while nonscheduled injuries are the exception.[8] When an employee's injury involves both arms, as here, there is a rebuttable presumption that the claimant is permanently and totally disabled. That presumption can be rebutted by evidence that the claimant is capable of engaging in some type of substantial gainful employment.[9] Claimant argues that *Casco* was wrongly decided by the Supreme Court. The Board will follow the Supreme Court's holding in *Casco* and attempt to apply it to the facts as determined herein.

Claimant has sustained two sets of parallel bilateral upper extremity injuries. Claimant is presumptively permanently and totally disabled. However, that presumption is rebutted by the fact that claimant was engaged in substantial gainful employment post-injury working for G&D Metals. No doctor has restricted claimant's activities to a degree that substantial gainful employment would be entirely prevented and no vocational expert said claimant was incapable of accessing the open labor market. Moreover, claimant did not argue that he is totally disabled. Consequently, claimant is not entitled to permanent total disability benefits under K.S.A. 44-510c(a)(2) but is entitled to compensation for his scheduled injuries.

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[7] *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 (1931).

[8] *Casco*, 283 Kan. 508, Syl. ¶ 7; *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

[9] *Casco*, Syl. ¶ 9.

Here, claimant sustained bilateral, parallel and simultaneous injuries to his upper extremities. Both of those extremities (arms) are listed in K.S.A. 44-510d. He is not permanently and totally disabled. Thus, under the *Casco* analysis, claimant is entitled to recovery based upon his separate scheduled injuries.

Respondent further argues that the ratings to claimant's arms should be decreased. Both Drs. Fevurly and Fluter rated claimant's bilateral carpal tunnel syndrome at 10 percent to each upper extremity. Dr. Fluter provided an additional 10 percent rating to each of claimant's upper extremities for ulnar nerve entrapment at the elbows. The ALJ determined that after a careful review of all the evidence, Drs. Fluter's and Melhorn's opinions were the most persuasive. The Board agrees.

Finally, the claimant argues K.S.A. 44-510d is unconstitutional as the statute violates both the Equal Protection and Due Process clauses of the State and Federal Constitutions. Claimant wishes to preserve the issue, acknowledging the Board does not have the authority to declare an act of the legislature to be unconstitutional. The Board is not a court of proper jurisdiction to decide the constitutionality of laws in the state of Kansas. A statute is presumed constitutional.[10] The Board shall apply K.S.A. 44-510d as written and interpreted by courts of competent jurisdiction.

The Board notes that the ALJ did not award claimant's counsel a fee for his services even though the record contains a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. The Board remands this matter to the ALJ to review and approve or disapprove the fee agreement between claimant and his attorney.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated June 21, 2007, is affirmed.

IT IS SO ORDERED.

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[10] *Baker v. List and Clark Construction Co.*, 222 Kan. 127, 563 P.2d 431 (1977).

Dated this _____ day of November, 2007.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Vincent Burnett, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge